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ATTORNEYS FOR APPELLEE:

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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| CHARLES ROBERT GREER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 69A04-0701-CV-7 |
| | ) | |
| WILLIAM R. FUCHS, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0209-CC-66

October 25, 2007

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

In a previous appeal, we reversed and remanded this case for further proceedings. *Greer v. Fuchs*, No. 69A05-0510-CV-573 (Ind. Ct. App. July 18, 2006) ("*Greer I*"); Appellant's App. at 150-62. In the current appeal, Charles Robert Greer challenges the judgment the trial court issued in favor of William R. Fuchs in response to *Greer I*. We affirm.

## Issues

Greer raises four issues, which we consolidate and restate as follows:

I. Whether the trial court's November 6, 2006 judgment in response to *Greer I* constitutes error as a matter of law; and

II. Whether the trial court abused its discretion in denying his motion for relief for judgment.

## Facts and Procedural History

The evidence most favorable to the trial court's judgment follows. In 2002, Greer and Fuchs were parties to a contract pursuant to which Greer was operating and purchasing Neal's Auto Salvage and Repair Yard ("the Property") in Osgood, Indiana.[1] Pursuant to the contract, the purchase price of the Property was $163,500.00, toward which Greer made monthly payments. The contract also required Greer to pay the real estate taxes on the Property.

On September 23, 2002, Fuchs filed a complaint for ejectment and cancellation alleging breach of contract and also filed a complaint for damages alleging that Greer

[1] J.D. Miller was the original purchaser, but Greer assumed all his rights and obligations pursuant to the original contract in 1996.

operated the salvage operation in violation of Indiana law by storing used automobile tires on the premises. Fuchs requested a judgment against Greer for the costs of putting the Property in compliance with state and local laws, a preliminary injunction restraining Greer from removing any property and equipment from the Property, and a permanent injunction prohibiting Greer from entering the Property.

On October 15, 2002, Fuchs moved for a temporary restraining order and a preliminary injunction. On October 23, 2002, the trial court granted his motion and awarded him immediate possession of the Property. On November 4, 2002, Fuchs petitioned for the appointment of a receiver, which the trial court granted on November 15, 2002. On December 11, 2002, Fuchs filed a petition to substitute receiver, which was also granted.

On July 26, 2005, the trial court issued its judgment ("2005 Judgment"), which stated in relevant part:

> 9. [Fuchs] obtained possession of the real estate in October 2002 and a receiver was appointed to operate the salvage business to the extent of disposing of salvageable metals on the real estate in October of 2002 belonging to [Greer] and commenced his activities in December, 2002.
>
> ….
>
> 12. [Greer] also accumulated, during his possession of the premises, in violation of State law, IDEM regulation and town ordinance, approximately 20,000 automobile and truck tires.
>
> 13. The cost of disposing of the tires to bring the property in compliance is Twenty Five Thousand Dollars ($25,000.00).
>
> 14. Real estate taxes paid by [Fuchs] amounted to Five Thousand Five Hundred Sixty dollars and twenty three cents ($5,560.23).
>
> 15. Miller paid Twenty Eight Thousand dollars ($28,000.00) from July 15, 1995 to June 15, 1996 toward the purchase price of the contract.

16. [Greer] established that he paid Sixty One Thousand Seven Hundred Ninety One dollars and thirteen cents ($61,791.13) pursuant to the agreement during which time he should have paid from July 1996 to September 2004 when suit was filed, approximately One Hundred Thirty Five Thousand Five Hundred Dollars ($135,500.00) plus taxes of Five Thousand Five Hundred Sixty Dollars and twenty three cents ($5,560.23).

17. [Greer] is clearly in default under the terms of the agreement.

18. [Greer] has damaged the property to the extent of the cost of removal and disposal of the tires, or Twenty Five Thousand Dollars ($25,000.00).

….

**IT IS THEREFORE ORDERED BY THE COURT** that:

1. [Fuchs] shall have full and complete possession of the real estate without further interference and free and clear of any encumbrances by [Greer].

2. The parties' contract is cancelled.

3. [Fuchs] is awarded damages for injury to the real estate in the amount of Twenty Five Thousand Dollars ($25,000.00).

4. [Greer] shall have as a set off against the judgment granted the sum of Twenty Five Thousand Dollars ($25,000.00) previously paid to [Fuchs] under the contract.

5. [Greer's] Counterclaim and cross-claims are denied.

6. The remainder of amounts paid by [Greer] toward the purchase price, or Thirty Six Thousand Seven Hundred Ninety One Dollars and thirteen cents ($36,791.13) shall be retained by [Fuchs] as rent for the period from July 1996 through September 2002.

7. The receiver shall pay over to [Greer] all funds being held by the receiver.

8. [Fuchs] shall pay to [Greer] all funds being held for payment for processing the automobiles tires.

Appellee's App. at 2-5.

Greer appealed. We found one of the issues he raised dispositive: whether "the trial court erred by ordering him to forfeit the Property including his stockpiled inventory and equipment." *Greer I*, slip op. at 7; Appellant's App. at 156. On July 18, 2006, we issued a memorandum decision, in which we concluded that, based on our supreme court's opinion in *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), "the trial court erred when it ordered forfeiture rather than foreclosure as the remedy." *Greer I*, slip op. at 11-12; Appellant's App. at 160-61. In so holding, we noted that finding 15 was clearly erroneous and should have stated that Miller had made payments of $33,000, bringing the total amount paid toward the purchase price to $94,791.13. *Greer I*, slip op. at 11; Appellant's App. at 160. We reversed and remanded for judgment consistent with our opinion.

On July 25, 2006, Greer filed a motion for relief from judgment alleging that there was newly discovered evidence, that fraud had been perpetrated upon the court, and that foreclosure was no longer equitable. Appellant's App. at 44-48. On August 2, 2006, the trial court declined to act on the motion until *Greer I* was certified. *See* Ind. Appellate Rule 65(E) (prohibiting the trial court or the parties from taking any action on an opinion or memorandum decision until it is certified). Also on that day, Fuchs filed a motion for judgment of foreclosure. On October 23, 2006, the trial court held a hearing on these matters. In support of his motion for relief from judgment, Greer submitted the affidavit of William Lutz, whom Fuchs hired to operate Neal's Salvage Yard after Fuchs was granted

possession on October 25, 2002.[2] Greer also submitted a report summarizing all the salvage materials sold to River Metals by Neal's Salvage Yard between October 25, 2002, and April 20, 2005. At the close of the hearing, the trial court took all matters under advisement.

On November 6, 2006, the trial court issued a judgment ("2006 Judgment"), which provides in relevant part,

> 1. [Greer] has failed to show that there is newly discovered evidence which could not have been offered at the trial of this matter with due diligence by [Greer].
>
> 2. [Greer] has failed to show that a fraud was perpetrated upon the Court;
>
> 3. There is no reason justifying relief from the operation of the judgment;
>
> 4. The Court of Appeals reversal only directed that [Greer] be given credit for an additional $5,000 on the purchase price for the real estate and that the real estate should be sold at Sheriff's sale.
>
> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that;
>
> 1. [Greer's] Motion for Relief From Judgment is denied.
>
> 2. [Fuchs] is granted a personal judgment against the Defendant, Robert Greer, in the sum of $68,708.87, plus the sum of $5,560.23 for taxes on the real estate paid by [Fuchs] for a total of $74,269.10, plus post-judgment interest at the statutory rate.
>
> 3. [Fuchs] holds a first priority lien securing the above sum on [the Property.]
>
> 4. The equity of redemption of [Greer] in [the Property] is hereby foreclosed.
>
> 5. The Sheriff of Ripley County, Indiana, is ordered to sell [the Property] to satisfy the sums due [Fuchs] as soon as said sale can be had under the laws of the State of Indiana.

[2] Fuchs also hired Lutz's son, Brent Lutz, to operate Neal's Salvage Yard.

6. The Sheriff of Ripley County, Indiana, is ordered to issue a proper deed to the purchaser at said sale.

….

8. The Proceeds of the sale shall be distributed pursuant to Ind. Code 32-30-10-14.

    a. First, to the costs of the Sheriff's sale and any real estate taxes due and owing on [the Property];

    b. Second, to satisfy the sums due and owing [Fuchs]; and

    c. The remaining proceeds, if any there be, to the Clerk of this Court for the benefit of the parties and subject to further order of this Court.

Appellant's App. at 11-12. Greer appeals.

## Discussion and Decision

### *I. 2006 Judgment*

Greer contends that the 2006 Judgment constitutes error as a matter of law because it failed to provide for disposition, by foreclosure or otherwise, of Greer's stockpiled inventory, equipment, and business interests. In *Greer I*, we held that finding 15 was clearly erroneous and should have stated that Miller had made payments of $33,000, rather than $28,000. The 2006 Judgment provided Greer with an additional credit of $5,000 toward the purchase price. In addition, in *Greer I*, we held that foreclosure, rather than forfeiture, was the appropriate remedy. The 2006 Judgment awarded Fuchs a lien on the Property in the amount of $74,269.10 and ordered the Ripley County Sheriff sell the Property to satisfy the sums due Fuchs. Our decision in *Greer I* left the remainder of the 2005 Judgment intact. In these respects, the 2006 Judgment appears to be in complete compliance with our opinion in *Greer*

*I.*

Next, Greer notes that the 2005 Judgment contained the following provisions:

> 7. The receiver shall pay over to [Greer] all funds being held by the receiver.
>
> 8. [Fuchs] shall pay to [Greer] all funds being held for payment for processing the automobiles tires.

Appellee's App. at 5. Greer states that the 2006 Judgment does not include disposition of the funds held in trust by the receiver or Fuchs. As previously noted, other than reversing finding 15 and the remedy of forfeiture, *Greer I* did not disturb the 2005 Judgment. The trial court was not required to re-issue the portions of the 2005 Judgment left standing.[3]

Greer also complains that the 2006 Judgment awards Fuchs a sum greater than the sum he sought at the October 23, 2006 hearing. However, the amount the trial court awarded is simply the contract price ($163,500.00) less the total amount Greer and Miller paid toward it ($94,791.13) plus the real estate taxes paid by Fuchs ($5,560.23) for a total of $ 74,269.10. We find no error here.[4]

[3] On November 6, 2006, Greer filed a motion for turnover of funds held in trust by the receiver and Fuchs, which the trial court denied the same day. Greer did not appeal the denial of that motion. In his appellant's brief, Greer merely notes that the trial court denied the motion. Appellant's Br. at 12. His attempt in his reply brief to claim that the trial court erred in denying his motion is unavailing. *See Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived.").

[4] Fuchs states the "[t]he Court of Appeals also found Fuchs was entitled to $25,000 in damages for the cost of tire removal." Appellee's Br. at 8. Fuchs then suggests that the 2006 Judgment is inconsistent with *Greer I* because he was awarded a judgment that is $25,000 less than what it should have been. *Id*. Fuchs' interpretation of *Greer I* is inaccurate. Rather, we stated,

### *II. Motion for Relief From Judgment*

Greer filed a motion for relief from judgment pursuant to Indiana Trial Rule 60(B), and he had the burden of proving he was entitled to relief. *See G.B. v. State*, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999) ("On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just."). The decision of whether to grant or deny a Trial Rule 60(B) motion for relief from judgment is within the sound, equitable discretion of the trial court. *Stonger v. Sorrell*, 776 N.E.2d 353, 358 (Ind. 2002) (citing *Wolvos v. Meyer*, 668 N.E.2d 671, 678 (Ind. 1996)). We will not reverse a denial of a motion for relief from judgment in the absence of an abuse of discretion. *Id*. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the circumstances before it. *Marks v. Tolliver*, 839 N.E.2d 703, 707 (Ind. Ct. App. 2005).

Trial Rule 60(B) sets forth the grounds upon which relief from judgment may be granted. Greer appeals the trial court's denial with respect to Trial Rule 60(B)(2),-(3), and -(7).[5] He also claims that the trial court erred in ruling on his motion without a new hearing. We address each claim in turn.

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> Having determined that Greer paid more than the minimal amount, we need not address whether Fuchs' security interest was jeopardized by Greer's acts or omissions. However, we note that although the trial court found that Greer damaged the Property in the amount of $25,000, an injury to the property, by itself, does not establish that a vendor's security interest was jeopardized.

*Greer I*, slip op. at 12. We continued, "A damage judgment for waste is appropriate only where the foreclosure does not satisfy the vendor's remaining security interest." *Id*. Therefore, the 2006 Judgment is not inconsistent with *Greer I* in this respect.

[5] Greer also moved for relief from judgment based on Trial Rule 60(B)(8), but he is not appealing the trial court's denial on that basis.

### *A. Trial Rule 60(B)(2)*

Pursuant to Trial Rule 60(B)(2), a trial court may relieve a party from an entry of default, final order, or final judgment for "any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59." Greer alleges that the trial court erred in finding that Greer failed to show that there is newly discovered evidence that could not have been offered at trial. Appellant's Br. at 19. Other than that single allegation, Greer does not remotely touch on this subject in his appellant's brief. He refers to it once in his appellant's reply brief, but only because he quotes a statement from Fuchs' appellee's brief. Appellant's Reply Br. at 4. Greer's failure to develop this argument or support it with citations to authority waives the issue for our review. *See Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that appellants waived issue by not presenting a cognizable argument in support thereof), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on ... .").

### *B. Trial Rule 60(B)(3)*

Pursuant to Trial Rule 60(B)(3), a trial court may relieve a party from an entry of default, final order, or final judgment for fraud, misrepresentation, or other misconduct by an adverse party. To succeed on a claim of fraud on the court, one must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and

that such acts prevented the losing party from fully and fairly presenting its case or defense. *Stonger*, 776 N.E.2d at 357. Fraud on the court has been narrowly applied and is limited to the most egregious of circumstances involving the courts. *Id.*; *In Re Paternity of Tompkins*, 518 N.E.2d 500, 507 (Ind. Ct. App. 1988). To prove fraud on the court, it is not enough to show a possibility that the trial court was misled. *Shephard v. Truex*, 823 N.E.2d 320, 325 (Ind. Ct. App. 2005). Rather, there must be a showing that the trial court's decision was actually influenced. *Id*. If a party cannot show that fraud, misrepresentation, or misconduct substantially prejudiced the party's presentation of the party's case, a court should not set aside an otherwise final judgment. *Outback Steakhouse of Fl., Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006).

Further, the party seeking relief for "fraud, misrepresentation or misconduct" is required to show "a meritorious claim or defense." *Id*. This requires a showing "'that vacating the judgment will not be an empty exercise.'" *Id*. (quoting 12 MOORE'S FEDERAL PRACTICE, § 60.24[1] (3d ed. 1997)). The requirement of a meritorious defense merely requires a prima facie showing, that is, a showing that "will prevail until contradicted and overcome by other evidence." *Smith v. Johnston*, 711 N.E.2d 1259, 1265 (Ind. 1999). The movant need only "present evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the judgment to stand." *Id*.

Specifically, Greer claims that William Lutz's affidavit and the River Metals Report show that Fuchs' trial testimony, depositions, and actions amount to fraud, negligent misrepresentation, or misconduct, which prevented him from fairly presenting his case at

trial. Greer directs our attention to the following portions of Lutz's affidavit:

> 16. Eaton and Fuchs also obtained a court order appointing Ray Craig ("Craig") as Receiver whose duty they instructed was to be [ ] available upon the truckers'[6] return to accept the checks issued as payment for Greer's property, and deposit them into a Receiver's account for distribution pursuant to the court's order.
>
> ….
>
> 20. Fuchs and Eaton authorized and directed Brent and me to accept, endorse and cash River Metal's checks to Neal's and from such proceeds from the sale of such scrap, to pay: Fuchs, Three Hundred Dollars ($300.00) per week as the land contract payment; and to retain the balance of all proceeds, pursuant to Fuch's [sic] agreement for Brent to take over the junkyard.
>
> ….
>
> 22. The payment to Fuchs of Three Hundred Dollars ($300.00) per week out of the proceeds from the sale of Greer's property and the proceeds from the sale of scrap purchased with the proceeds from the sale of Greer's property and generated from the junkyard totaled approximately Thirty Nine Thousand Dollars ($39,000), from October 25, 2002, through April 20, 2005 at which time we had exhausted all salvageable material to sell and could no longer pay Fuchs and he kicked Brent and me off and closed the junkyard.
>
> ….
>
> 23. Fuchs and Eaton directed Brent and me to not prepare itemized inventory of Greer's property on the junkyard at the time Fuch's [sic] retook possession in October 2002.
>
> 24. All expenses and all purchases of scrap, while Fuchs, Brent and I operated the junkyard from October 25, 2002 to May 2005, were paid for from the proceeds from the sale of Greer's property or proceeds from the sale of property acquired from the proceeds from the sale of Greer's property, except for One Thousand Dollars ($1,000.00) Fuchs put up for expenses to begin our activities.
>
> ….
>
> 26. Brent and I, as directed by Mr. Eaton, continued to remove and sell

[6] The individuals hauling the salvage material from Neal's to River Metals.

> salvage from the junkyard under Fuch's [sic] direction; and, informed Craig that we would not pay him.
>
> 27. Greer, by his attorney, issued a Notice of Deposition along with a Subpoena Duces Tecum for Brent and me to appear and to bring copies of all River Metals weigh tickets and records and all books and records for Neals, for the period from October 23, 2002 to that time, which Mr. Eaton received and advised us Brent did not have to appear and for me to not cooperate with answers and to not answer if he objected or so instructed me to not answer.
>
> 28. At my deposition, I followed Mr. Eaton's instructions, did not answer questions regarding purchases Brent made with the proceeds from the sale of Greer's scrap, kept Brent from appearing and concealed the full truth.

Appellant's App. at 51-53; Appellant's Br. at 21. The River Metals report shows that River Metals paid $783,009 to Neal's Salvage Yard between November 2002 and March 2005. Appellant's App. at 131.

Greer cites *Rocca v. Rocca*, 760 N.E.2d 677 (Ind. Ct. App. 2002), *trans. denied*, in support of his argument that Fuchs perpetrated fraud on the court. There, wife filed a motion for relief from judgment pursuant to Trial Rule 60(B)(3) seeking to set aside a previously ordered disposition of marital assets. At the disposition hearing, husband had testified that he had no interest in two particular parcels of real estate. However, when husband's father passed away three years later, husband filed an affidavit with the probate court concerning the two parcels, in which he averred that although both parcels of real estate were in his father's name, he had paid all the expenses on parcel #1 and had declined to have the property transferred to his name because he was contemplating a divorce, and bought parcel #2 when he was having marital problems, so he placed his father's name on the title. Wife submitted the affidavit and husband's exhibit from the dissolution hearing in which he failed

to disclose any interest in the two parcels. The trial court held a hearing on the motion, at which husband admitted that he had an agreement with his father regarding his father's ownership of the parcels because of his failing marriage. The trial court found that husband had committed a fraud upon the court. We affirmed.

*Rocca* is distinguishable from the case at bar. In *Rocca*, wife established that husband denied having any interest in the properties at the dissolution hearing, and later in probate court swore that the properties were actually his and not his father's. Further, the husband admitted to having an agreement with his father. Neither Lutz's affidavit nor the River Metals report provides evidence that is even remotely as probative as the evidence presented in *Rocca*. We note that it is not enough to show a possibility that the court was misled. *See Matter of Paternity of K.M.*, 651 N.E.2d 271, 277 (Ind. Ct. App. 1995) (holding that even though DNA evidence showed appellee was not the father of child, where there was no evidence that at the time of the paternity action mother knew or had reason to know that appellee was not the father of her child; mother's assertion at paternity hearing that appellee was the father did not amount to a deliberate attempt to defraud the court). Furthermore, in *Rocca* we affirmed the trial court's ruling that fraud on the court had been committed, whereas here we are asked to reverse the trial court's finding that Greer failed to establish fraud upon the court. Based upon our review of the evidence submitted by Greer, we cannot say that the trial court abused its discretion.

Greer also cites *Outback Steakhouse*, 856 N.E.2d 65, apparently to suggest that even if Fuchs did not commit fraud upon the court, Fuchs' conduct constitutes misconduct as that term is construed pursuant to Trial Rule 60(B)(3). However, *Outback Steakhouse* does not

support Greer's position. In *Outback*, the focus of inquiry was on the Markleys' attorney's multiple violations of Indiana discovery rules, specifically his failure to disclose the name of a witness with knowledge of material facts and his failure to supplement an interrogatory, in addition to that attorney's attack on the credibility of Outback's counsel during closing argument, purposely taking unfair advantage of Outback's ignorance of the whole story. The supreme court found that the attorney's multiple acts of misconduct, any one of which might be overlooked, had a *cumulative effect* that resulted in prejudice to Outback Steakhouse and produced a result that was unfairly procured. *Id*. at 81.

Here, the alleged conduct is not equivalent to the attorney's conduct in *Outback Steakhouse*. Moreover, we cannot say that the Greer's presentation of his case was substantially prejudiced. Greer could have called Lutz and his son as witnesses but did not do so. We conclude that the trial court did not abuse its discretion in denying Greer's request for relief from judgment based on Trial Rule 60(B)(3).

### *C. Trial Rule 60(B)(7)*

Trial Rule 60(B)(7) permits relief from judgment where "it is no longer equitable that the judgment should have prospective application." Greer asserts that foreclosure is no longer equitable and therefore relief from judgment is warranted.

To establish that it is no longer equitable for a final judgment to have prospective application, the movant must show that there has been a change of circumstances since the entry of the original judgment and that the change of circumstances was not reasonably foreseeable at the time of entry of the original judgment. *In re Marriage of Jones*, 180 Ind. App. 496, 499, 389 N.E.2d 338, 341 (1979); *State v. Martinsville Dev. Co.*, 174 Ind. App.

157, 161, 366 N.E.2d 681, 684 (1977). However, Trial Rule 60(B)(7) is inapplicable here because the judgment does not have prospective application. *See Martinsville*, 174 Ind. App. at 161, 366 N.E.2d at 684 ("[T]o obtain relief from the operation of a final judgment under this provision of TR 60(B)(7), it is necessary that the original judgment have prospective application."). We have stated that a judgment has prospective application where "a person's right to do or not to do some act is continuously affected by the operation of the judgment, in the future; or, that the judgment is specifically directed toward some event which is to take place in the future *and* does not simply serve to remedy past wrongs." *Id.* at 163, 366 N.E.2d at 685 (emphasis added). Greer does not provide any authority to support his argument that a judgment ordering foreclosure as a remedy for breach of contract is a prospective judgment as contemplated by Trial Rule 60(B)(7). While it may be true that the ordered foreclosure is a future event, it was ordered solely as a remedy for Greer's past breach of contract. The trial court did not abuse its discretion in denying relief pursuant to Trial Rule 60(B)(7).

### *D. Hearing*

Finally, Greer contends that the trial court erred when it denied his motion for relief from judgment without affording him a hearing as required by Trial Rule 60(D), which provides,

> In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise permitted by subdivision (B) of this rule.

A hearing is unnecessary, however, where there is no pertinent evidence. *Benjamin v. Benjamin*, 798 N.E.2d 881, 889 (Ind. Ct. App. 2003).

Initially, we observe that on October 23, 2006, the trial court held a hearing on Greer's motion for relief. At that hearing, Greer was permitted to submit evidence in support of his motion. The evidence consisted of an affidavit of William Lutz, and a report summarizing Neal's sales of salvage materials to River Metals. The trial court then took the matter under advisement. Thus, our review of this issue is limited to whether the trial court erred in failing to permit Greer to call witnesses and seek further discovery.

Greer argues that the witnesses and discovery would have provided pertinent evidence. In support of his argument, Greer cites *Rothschild v. Devos*, 757 N.E.2d 219 (Ind. Ct. App. 2001). In *Rothschild*, wife filed for dissolution of marriage shortly after husband fell and broke his hip and suffered a mini-stroke. Wife sought a preadmission screening for husband's placement in a nursing home. That same month, husband and wife signed a property settlement agreement that assigned essentially all the marital assets to wife. Two days later, husband went to the doctor, accompanied by his wife, complaining of "left sided weakness, falling three or four times a day, and some slurred speech, all of which had been going on for about a week." *Id*. at 221. Husband was diagnosed as having had a stroke and as suffering from dementia. Five days later the divorce decree was entered, and the property settlement agreement was approved.

Husband moved for relief from judgment, seeking to set aside the dissolution decree. He argued that he was suffering from a legal disability at the time he signed the property agreement; that he was unduly influenced by wife to sign the agreement; that he was under duress when he signed it; that there was fraud perpetrated by wife on husband and/or the court; and, that he was not represented by an attorney during the divorce although wife was.

A hearing was held, and husband's doctor testified that he would find it hard to accept that husband could have actually been able to read the property settlement agreement. Thereafter, the hearing was postponed, and husband submitted discovery requests to wife. Wife did not comply with the discovery requests. Husband filed a motion to compel discovery, which was granted, but she still did not comply. Husband filed a petition for contempt and sanctions, and a hearing was scheduled but never held. The case was then re-assigned to a new judge, who issued an order denying husband's motion for relief from judgment. We held that the trial court abused its discretion by not allowing husband to obtain discovery and present his evidence before it ruled on his motion for relief from judgment. *Id*. at 224. In so holding, we noted, "[I]t appears from [husband's] motion for relief from judgment and the evidence presented at the partial hearing that he will be able to present further pertinent evidence if given the opportunity." *Id*.

*Rothschild* is clearly distinguishable from the case at bar. There, the trial court granted husband's discovery request and motion to compel discovery. However, a new judge denied husband's motion without ruling on husband's contempt petition. Further, given the evidence in *Rothschild,* an inference that husband had a stroke before he signed the property settlement agreement and that he could not have been able to read and understand it is not at all unreasonable. Finally, wife had an attorney during the divorce while husband was without representation. None of these circumstances are present here, and therefore *Rothschild* is not dispositive.

Although Greer claims that Lutz, his son, and a representative from River Metal were available to testify at the hearing on October 23, 2006, he has not explained how their

testimony would add to the affidavit and report he submitted. In fact, it appears their testimony would have been cumulative based on Greer's statement that they were "fully prepared to present evidence specifically detailed in his affidavits and motion." Appellant's Br. at 13-14. In any event, Greer's attorney did not request that his witnesses testify at the hearing, stating that, for reasons of judicial economy, further discovery was necessary in order to proceed. Tr. at 14. With regard to further discovery, Greer has not explained what additional discovery he believes is necessary or what that discovery would show beyond the evidence he has already submitted. Based on our review of the record, we cannot say that the trial court abused its discretion in ruling on Greer's motion for relief from judgment without hearing additional testimony and permitting additional discovery. *See Thompson v. Thompson*, 811 N.E.2d 888, 904 (Ind. Ct. App. 2004) (holding that, where husband brought a Trial Rule 60(B) motion based on mistake, surprise, or excusable neglect, a hearing, while possibly useful in establishing prejudice, was unnecessary because husband failed to establish excusable neglect), *trans. denied* (2005).

Based upon the foregoing, we affirm the trial court in all respects.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.